

Steven F. Molo (SM 1818)  
Brian H. Polovoy (BP 4723)  
SHEARMAN & STERLING LLP  
599 Lexington Avenue  
New York, New York 10022-6069  
Telephone: (212) 848-4000  
Facsimile: (212) 848-7179

Attorneys for Defendants Morgan Stanley,  
Morgan Stanley Investment Advisors Inc.,  
Charles A. Fiumefreddo, and James F. Higgins

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JOHN MARSHALL EVERETT, PAMELA A.	:
KRAMER, and WALTER W. LAWRENCE,	:
on Behalf of Themselves and all Others Similarly	:
Situated,	:
	:
Plaintiffs,	:
	:
v.	:
	:
MICHAEL BOZIC, EDWIN J. GARN,	:
WAYNE E. HEDIEN, DR. MANUEL H.	:
JOHNSON, JOSEPH J. KEARNS,	:
MICHAEL E. NUGENT, FERGUS REID,	:
CHARLES A. FIUMEFREDDO, JAMES F.	:
HIGGINS, MORGAN STANLEY DEAN	:
WITTER & CO., INC., MORGAN STANLEY	:
INVESTMENT ADVISORS, and	:
JOHN DOES NO. 1 through 100,	:
	:
Defendants.	:
-----X	

05 CV 00296 (DAB)  
ECF CASE

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
MOTION OF CHARLES A. FIUMEFREDDO AND  
JAMES F. HIGGINS TO DISMISS THE COMPLAINT**

Defendants Charles A. Fiumefreddo and James F. Higgins respectfully submit this  
reply memorandum in further support of their motion to dismiss plaintiffs' complaint. This

memorandum responds to plaintiffs' "Memorandum in Opposition to Defendants Charles A. Fiumefreddo and James F. Higgins's Motion to Dismiss" dated June 28, 2005 [docket no. 24].

### ARGUMENT

In their opening memorandum, Fiumefreddo and Higgins, two of the nine trustees (the "Trustees") of various Morgan Stanley mutual funds (the "Funds"), incorporated by reference the arguments made by defendants Morgan Stanley and Morgan Stanley Investment Advisors Inc. in their May 6, 2005 motion to dismiss [docket nos. 4-5] and made three additional points:

- (1) A federal court subsequently dismissed with prejudice the identical case plaintiffs' counsel filed against the advisors, trustees and affiliates of the Allianz Family of Mutual Funds (Opening Mem. at 2, discussing Mutchka v. Harris, No. SACV 05-34 JVS, 2005 WL 1414304 (C.D. Cal. June 8, 2005));
- (2) The Declaration of Trust of each of the Funds in which plaintiffs alleged they owned shares precludes Trustee liability with respect to the negligence and breach of fiduciary duty claims alleged in the Complaint (Opening Mem. at 3-4); and
- (3) Plaintiffs' breach of fiduciary duty and negligence claims also fail because plaintiffs did not allege any facts sufficient to overcome the business judgment rule (Opening Mem. at 4-5).

Plaintiffs' opposition memorandum ignores these points and – significantly – ignores the federal court decision dismissing with prejudice the identical complaint their lawyers filed against Allianz. But ignoring these points doesn't make them go away. Indeed, it speaks volumes that plaintiffs do not *mention* that another court dismissed the identical lawsuit that their lawyers filed against Allianz. Likewise, it speaks volumes that plaintiffs make no attempt to rebut the Trustees' arguments that plaintiffs' claims are barred by the Declaration of Trust governing the Funds and the business judgment rule.

**CONCLUSION**

In the interests of brevity, Fiumefreddo and Higgins join in and incorporate by reference the arguments in the reply memorandum filed by Morgan Stanley and Morgan Stanley Investment Advisors Inc. on June 21, 2005 [docket nos. 22-23]. For the reasons set forth there, by the Mutchka court, and in Fiumefreddo's and Higgins's opening memorandum, plaintiffs' Complaint should be dismissed with prejudice.

Dated: New York, New York  
July 6, 2005

Respectfully submitted,

SHEARMAN & STERLING LLP

By: /s/ Brian H. Polovoy  
Steven F. Molo (SM 1818)  
Brian H. Polovoy (BP 4723)

599 Lexington Avenue  
New York, New York 10022-6069  
Telephone: (212) 848-4000  
Fax: (212) 848-7179

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